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NOS. 14-614 and 14-623

In the
Supreme Court of the United States

W. KEVIN HUGHES, ET AL., *Petitioners*,
v.
PPL ENERGYPLUS, L.L.C., ET AL., *Respondents*.

CPV MARYLAND, LLC, *Petitioner*,
v.
PPL ENERGYPLUS, L.L.C., ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR NO. 14-614 PETITIONERS

JAMES A. FELDMAN
5335 Wisconsin Ave., NW
Washington, DC 20015
(202) 730-1267
wexfeld@gmail.com

SCOTT H. STRAUSS*
**Counsel of Record*
PETER J. HOPKINS
JEFFREY A. SCHWARZ
Spiegel & McDiarmid LLP
1875 Eye St., NW, Suite 700
Washington, DC 20006
(202) 879-4000
scott.strauss@spiegelmcd.com
Counsel for Petitioners

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QUESTIONS PRESENTED

The Federal Power Act (FPA) splits authority among states, utilities, and the Federal Energy Regulatory Commission (FERC). States regulate generation facilities and retail utility power purchases, but may not set wholesale rates. Wholesale energy sellers set their own rates. FERC has exclusive jurisdiction to review them and determine their legality.

In much of the country, independent system operators run multi-state transmission systems and wholesale energy markets. PJM Interconnection LLC (PJM), an operator whose region includes Maryland, procures by auction the generation capacity it expects the region to need for a one-year period beginning three years later. Looking beyond that horizon and concerned that facility retirements could degrade reliability, Maryland decided it needed new generation. It solicited offers and required retail utilities to contract with the winning bidder. The contracts obligate the bidder to build a plant and make it available to PJM for twenty years, while the retail utilities pay (or receive) the difference between the contract and PJM auction prices. The Fourth Circuit held Maryland's actions field and conflict preempted—contrary to the FPA's structure and decisions of this Court, the D.C. Circuit, and FERC.

The questions presented are:

1. When a seller offers to build generation and sell wholesale power on a fixed-rate contract basis, does the FPA field-preempt a state order directing retail utilities to enter into the contract?
2. Does FERC's acceptance of an annual regional capacity auction preempt states from requiring retail utilities to contract at fixed rates with sellers who are willing to commit to sell into the auction on a long-term basis?

PARTIES TO THE PROCEEDING

Petitioners in No. 14-614 are the current Chairman and Commissioners of the Maryland Public Service Commission—W. Kevin Hughes, Harold D. Williams, Lawrence Brenner, Anne E. Hoskins, and Jeannette M. Mills—in their official capacities. Rule 29.6 requires no statement by these petitioners.

Petitioner in No. 14-623 is CPV Maryland, LLC. CPV's Rule 29.6 statement is in its brief.

Petitioners were defendants in the district court and appellants before the court of appeals.

Respondents were plaintiffs in the district court and appellees in the court of appeals. They are: PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; PPL Renewable Energy, LLC; Public Service Electric and Gas Company (PSEG Power LLC); and Essential Power, LLC.

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OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-28a)[1] is reported at 753 F.3d 467 The district court's opinion (Pet. App. 62a-196a) is reported at 974 F. Supp. 2d 790.

JURISDICTION

The court of appeals entered judgment on June 2, 2014. The court of appeals denied rehearing on June 30, 2014. Pet. App. 197a-201a. The Chief Justice extended the time for filing a petition for a writ of certiorari to review the Fourth Circuit's judgment until November 27, 2014. Pet. App. 214a-216a. The petition in No. 14-614 was filed on November 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in pertinent part at:

U.S. Const. art. VI, cl. 2.....Pet. App. 207a.

Federal Power Act

§201, 16 U.S.C. § 824.....Pet. App. 208a-210a.
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§207, 16 U.S.C. § 824f.....JA 902.

INTRODUCTION

The facts of this case are undisputed: Maryland needed new electric generation facilities to meet reliability concerns, and solicited offers. CPV Maryland,

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[1] All Pet. App. citations below refer to the petition appendix filed in No. 14-614.

LLC (CPV) responded. It offered to build a power plant and bid its output into a regional power market for twenty years in exchange for fixed contract prices. Maryland accepted CPV's offer and directed its distribution utilities to enter the contract. Under it, the distribution utilities would pay or receive the difference between the contract and market prices.

The Fourth Circuit struck down Maryland's directive as field and conflict preempted by the Federal Power Act (FPA). The court held that Maryland's acceptance of CPV's offer "set" rates for CPV's sales into a wholesale market, thereby invading the Federal Energy Regulatory Commission's (FERC's) exclusive jurisdiction over such sales. The court held Maryland's order both field and conflict preempted because the contract prices differed from the one-year prices produced by the regional market's annual auction. The court also appeared to suggest that the contracts distort the auction outcomes, notwithstanding FERC's rulings to the contrary.

The Fourth Circuit's judgment should be reversed because it cannot be squared with the FPA or decisions of this Court and FERC. The holding that Maryland's directive "functionally set[]" CPV's wholesale rates (Pet. App. 19a, 23a) ignores this Court's precedent on FPA rate-setting and FERC review of wholesale rates. In enacting the FPA, Congress maintained jurisdictional sellers' authority to set their own rates for wholesale sales and the states' authority to regulate distribution utility decisions whether to contract with willing sellers. Congress authorized FERC to review the resulting rates and, if necessary, modify unlawful ones.

Maryland does not contest that the CPV contracts constituted FERC-jurisdictional rates. But what fol-

lows from that premise is FERC's power to review the contracts, not preemption. Maryland directed its regulated utilities to accept CPV's offer to build a plant and sell power at a price CPV determined, subject to FERC review. This is not state over-reaching; it is the statute working as intended, with sellers, states, and FERC each performing their assigned roles. The Fourth Circuit's opinion upsets that structure and frustrates FPA-sanctioned activity.

The holding that Maryland erred in setting a rate different and more enduring than the regional market's annual, fluctuating prices fails for related reasons. It disregards CPV's statutory right, as a public utility,[2] to sell on terms of its choosing subject to FERC review. The holding also misconceives the relationship between long-term contracts and shorter-term markets. The FPA is premised on contracting, and both FERC and this Court understand that long-term contracting—which stabilizes prices and promotes investment—is essential to regional market operations. Thus, there was no single, exclusive rate at which CPV could sell to the market. Finally, to the extent the Fourth Circuit could be read as suggesting that Maryland's orders distorted the federally regulated market, it impermissibly contradicts FERC's judicially reviewed and affirmed holdings.

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[2] For FPA purposes, the term "public utility" includes investor-owned utilities like CPV and other entities that own or operate facilities used for wholesale sales of electric energy in interstate commerce, 16 U.S.C. § 824(e), but excludes states, their political subdivisions, and certain other entities, *id.* § 824(f).

STATEMENT

A. Statutory background

For much of the twentieth century, "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems," *New York v. FERC*, 535 U.S. 1, 5 (2002). State regulation of utilities arose early. "By 1916, [thirty-three] states had established state agencies to oversee private electric utilities."[3] But the Commerce Clause barred states from regulating power sales in interstate commerce, *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927), creating a regulatory gap.

In 1935, Congress filled the gap by enacting the Federal Power Act (FPA), Pub. L. No. 74-333, § 213, 49 Stat. 803, 847 (later codified at 16 U.S.C. §§ 791a-825r), providing FERC's predecessor exclusive jurisdiction over the "transmission" and "sale of electric energy at wholesale" in interstate commerce by public utilities. 16 U.S.C. § 824(b)(1); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). In doing so, however, Congress preserved important roles for the utilities subject to FERC's authority and for the states.

1. Under the FPA, sellers set wholesale rates, and FERC regulates them.

From its inception, the FPA has afforded public utilities (i.e., FERC-jurisdictional sellers, *see supra*

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[3] The Elec. Energy Mkt. Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy: Pursuant to Section 1815 of the Energy Policy Act of 2005*, 18 (2007) (*Report to Congress on Competition*), http://perma.cc/9AJA-QTZ7 (footnote omitted).

note 2) the power to set rates for wholesale electric sales. The statute left sellers' "initial rate-making and rate-changing powers ... undefined and unaffected." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 343 (1956) (*Mobile*) (discussing parallel provisions of the Natural Gas Act (NGA)).[4] Except as specifically provided, those powers "were to be no different from those [that sellers] would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." *Mobile*, 350 U.S. at 343.

FERC "superintend[s]" this process. *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010). FPA section 205(a), 16 U.S.C. § 824d(a), requires that all rates "made, demanded, or received by any public utility" for a FERC-jurisdictional service "shall be just and reasonable." Public utility sellers must notify FERC of their rates under agency-prescribed rules, *id.* §§ 824d(c), (d), and FERC may reject rates that fail to meet the statutory standard. Under FPA section 206, 16 U.S.C. § 824e, FERC may adjust an existing rate, but only if FERC finds it unjust, unreasonable, or unduly discriminatory. Section 206 prescribes "neither a 'rate-making' nor a 'rate-changing' procedure[, but] simply the power to review rates and contracts made in the first instance by [sellers]" and, if they are unlawful, to "remedy them." *See Mobile*, 350 U.S. at 341 (discussing parallel provisions of the NGA).

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[4] The relevant FPA provisions are "in all material respects substantially identical to the equivalent provisions of the Natural Gas Act." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956).

2. Sellers can set rates by contract.

The FPA allows utilities to set rates either by filing tariffs or by entering "private contracts of varying terms." *Mobile*, 350 U.S. at 345.[5] The FPA's regulatory structure is, in fact, "premised on contractual agreements voluntarily devised by the regulated companies." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). Congress has recognized the "essential role" contracts play in providing rate stability, which facilitates investment and benefits consumers. *NRG Power Mktg.*, 558 U.S. at 174; *Morgan Stanley*, 554 U.S. at 551.

3. The FPA preserved state authority over retail rates, service reliability, generation development, and power purchasing.

The FPA, like the NGA, was "'drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.'" *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517-518 (1947)). Congress understood that while the entire "business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," federal regulation was necessary only as to parts of it: interstate transmission, wholesale sales, and "matters relating to generation to the extent provided," with such regulation to "extend only to those matters which are not subject to regulation by the [s]tates." 16 U.S.C.

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[5] *Accord Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 531 (2008); *NRG Power Mktg.*, 558 U.S. at 171.

§ 824(a); *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 530-31 (1945). At the same time, Congress left in place existing state authority to regulate local utilities' resource decisions.

a) States regulate generation development and electric service reliability.

Under the FPA, FERC and states share authority over electric service reliability and the adequacy of generation capacity, but regulation requiring enlargement of generation facilities is the states' province alone. 16 U.S.C. §§ 824a, 824f (FERC cannot compel "enlargement of generating facilities" even if necessary to remedy inadequate interstate service); *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("[n]eed for new power facilities" among the areas "characteristically governed by the [s]tates"). Congress retained that structure even while authorizing FERC (in 2005) to set bulk power system reliability standards. 16 U.S.C. § 824*o*(i)(2) (no FERC authority "to order the construction of additional generation ... or to set and enforce ... standards for adequacy ... of electric facilities or services"); *id.* § 824*o*(i)(3) (no preemption of state authority "to ensure the ... adequacy[] and reliability of electric service within that [s]tate, as long as such action is not inconsistent with any reliability standard ....").

States regulate both the size and composition of utility generation portfolios. Electricity may be fungible, but electric generation facilities have disparate cost structures, employment profiles, operating characteristics, fuel-delivery and storage needs, noise levels, visual qualities, local environmental impacts, and greenhouse-gas emission rates, among other things.

States need to control the local generation mix, as well as the physical operation of individual facilities, in order to manage such impacts while advancing policy objectives and ensuring local reliability.

b) States regulate distribution utility power purchases.

The FPA allows states to supervise the local generation mix, and does not limit them to regulating existing facilities and ordering vertically-integrated utilities to build new facilities. The statute also allows states to regulate retail utility decisions to contract with independent power sellers. Congress left that power to the states when it enacted the FPA in 1935 against a backdrop of state regulation of wholesale purchases.

Even in the industry's early days, utilities sometimes supplemented their own generation facilities with power purchased from others, subject to applicable state regulation.[6] By giving FERC authority over sales, without mentioning purchases, Congress left in place state authority to regulate retail utilities' power purchases. And later FPA amendments confirmed that FERC regulates wholesale sales, but has only limited

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[6] *E.g. In re Coalinga Water & Elec. Corp.* 2 Cal. R.C. Dec. 206 (Cal. R.R. Comm'n 1913) (authorizing utility purchase of hydroelectric power to substitute for existing steam-fired generation supply); *In re Tri Cty. Elec. Co.*, 1920E P.U.R. 400 (N.J. Bd. of Pub. Util. Comm'rs 1920) (conditionally approving contract to purchase needed electricity from municipal power plant); 1921 Nev. Stat. 166 (currently codified at Nev. Rev. Stat. Ann. § 704.320) (permitting "[e]very ... public utility ... the right to purchase ... electric current ... from any other person or corporation having for sale a surplus of such"); *In re San Joaquin Light & Power Corp. & S. Cal. Edison Co.*, 42 Cal. R.C. Dec. 593, 597 (Cal. R.R. Comm'n 1940) (authorizing purchase agreement based in part on benefit to purchasing utility's customers of "an assured source of power").

authority regarding wholesale purchases. *Compare, e.g.*, 16 U.S.C. §§ 824(b), 824d(a) (FERC jurisdiction over and regulation of wholesale sales, not mentioning purchases) *with id.* §§ 824t(a)(3)(A) (FERC power to obtain information from "any market participant," including buyers) and 824v(a) (prohibiting use of manipulative devices in connection with the wholesale "purchase or sale" of electric energy).[7]

In 1978, Congress curtailed to a limited extent state authority over retail utilities' purchasing decisions by enacting PURPA. That law mandated that "electric utilities," including local distribution utilities, purchase power from qualifying cogeneration and small power production facilities. PURPA § 210, 16 U.S.C. § 824a-3. FERC's implementing rule acknowledged that states generally have "authority under [s]tate law to review contracts for purchases as part of [the state's] regulation of electric utilities," and found such authority preempted only to the extent it conflicted with PURPA's mandate.[8]

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[7] In 1978, Congress added a new paragraph (f) to 16 U.S.C. § 824d, the provision governing wholesale-sales rates. Public Utility Regulatory Policies Act, Pub. L. No. 95-617, § 208, 92 Stat. 3117, at 3142-43 (1978) (PURPA). Congress directed FERC to determine whether automatic adjustment clauses in wholesale-sales rates incentivize efficient resource use, including economical purchases. *Id.* If FERC regulated wholesale purchases directly, that aspect of its regulation of sales-adjustment clauses would be superfluous.

[8] Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,233 (Feb. 25, 1980), FERC Stats & Regs. ¶ 30,128, at 30,896 (1980), *order on reh'g*, Order No. 69-A, 45 Fed. Reg. 33,958 (May 21, 1980), FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*,

That mandate left untouched the existing state authority over purchases from other kinds of resources, such as the natural-gas-fired generator at issue here. State regulation of distribution utilities' purchases is commonplace, and addresses a host of considerations, including resource diversity.[9] As both FERC and this Court have acknowledged, states retain "significant control over local matters," including continued authority over "reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, ...; [and] authority over utility generation and resource portfolios ...." *New York v. FERC*, 535 U.S. 1, 24 (2002) (quoting FERC Order No. 888).[10] Indeed, federal law encourages states to conduct integrated resource planning. 16 U.S.C. § 2621(d)(7).

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675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

[9] *See supra* note 6. *See also* 14-614 Pet. 20-25 & nn. 16-36 (discussing various state mandated-purchase laws); *see also, e.g.*, Colo. Rev. Stat. § 40-2-103 (utility can enter into purchase agreement with owner of integrated gasification combined cycle unit with commission approval); Conn. Gen. Stat. § 16a-3f (state agency to solicit proposals for renewable resources); Mich. Comp. Laws Serv. § 460.6s (commission approval required where utility seeks to enter purchase agreement longer than six years); R.I. Gen. Laws § 39-26.6-11 (electric distribution companies not required to enter purchase agreements to meet renewable energy requirements); Va. Code Ann. § 56-594 (utility must enter into purchase agreement with customer-generator pursuant to commission requirements); Wash. Rev. Code Ann. § 80.04.570 (commission approval required for purchase agreement for "coal transition power").

[10] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC

B. Regulatory background

1. Competitive procurement of retail electricity supply

Since at least the 1980s, states and their electric distribution utilities increasingly have used competitive resource procurement to meet retail needs. Susan F. Tierney & Todd Schatzki, *Competitive Procurement of Retail Electric Supply: Recent Trends in State Policies and Utility Practices* 1 (2008) (NARUC Study), http://perma.cc/L254-ZDV8[11]; *e.g.*, *Commonwealth Atl. Ltd. P'ship*, 51 FERC ¶ 61,368 (1990).

As of 2008, more than forty percent of U.S. states had regulations or guidance encouraging or requiring such procurements, NARUC Study at 1 & n.7, including states with vertically-integrated retail utilities and "restructured" states (like Maryland) where distribution utilities have sold their generation facilities. *Id.* at 4-6. The procurements can be conducted by the utilities, subject to state commission review, or by the state regulators themselves. *See id.* at 5 & n.14, 26-27 & n.44.

FERC has disavowed any intent to preempt state competitive procurement practices. 18 C.F.R. § 35.27 In fact, FERC *relies* on those practices to ensure the

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Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[11] The study was commissioned by the National Association of Regulatory Utility Commissioners (NARUC) as part of a collaboration with FERC on competitive power procurement policies and practices. *Id.* at 1-2.

reasonableness of certain wholesale sales. In recent decades, FERC has allowed jurisdictional sellers to set rates by contract without filing them for FERC's review, so long as the seller demonstrates that it lacks market power and reports the transaction terms quarterly. *See Morgan Stanley*, 554 U.S. at 537. When sellers with such market-based rate authority sell to affiliated distribution utilities, however, such sales may not result from fair competition. *Connectiv Energy Supply Inc.*, 115 FERC ¶ 61,199, PP 8-20 (2006). FERC relies on state oversight of the distribution utilities' procurements to ensure that the selection of an affiliated seller was competitive. *Id.*

2. Regional transmission organizations

To "promote competition in those areas of the industry amenable to competition," FERC encourages formation of "'Regional Transmission Organizations'—entities to which transmission providers ... transfer operational control of their facilities." *Morgan Stanley*, 554 U.S. at 536. Today, there are six such organizations encompassing New England, New York, California, the Mid-Atlantic, and much of the Midwest and Central Plains. *See* FERC Office of Enforcement, *Energy Primer: A Handbook of Energy Market Basics* 40 (2015) (*FERC Primer*), http://perma.cc/U9AG-K4M6.

a. These organizations operate their respective transmission grids, administer regional transmission service, maintain short-term grid reliability, and plan for grid expansion in coordination with state authorities. 18 C.F.R. §§ 35.34(j), (k). They also operate short-term (e.g., daily and hourly) electric energy markets, in which suppliers' bids to sell power are matched with demand on a moment-to-moment basis. The market

operator is the counterparty for these sales and purchases. *FERC Primer* at 59-61.

Market participants also buy and sell energy through bilateral contracts. Pet. App. 81a. Bilateral contracting enables parties to manage price risks associated with these markets. *Morgan Stanley*, 554 U.S. at 547 ("Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce.").

b. Power systems also require enough generating capacity to meet peak consumption requirements and cover contingencies. *FERC Primer* at 61. Historically, most utilities have met that need by owning generation or contracting for supplies bilaterally. *Id.* Most regional transmission organizations run a short-term auction, *id.*, through which they purchase "capacity," which is "an option to buy a quantity of energy, rather than ... the energy itself." *NRG Power Mktg.*, 558 U.S. at 168. These auctions procure such options for limited time periods: a month, a season, or a year. *FERC Primer* at 61.

3. PJM and its capacity auction

The "Pennsylvania-New Jersey-Maryland" or "PJM" power pool is a regional transmission organization spanning all or parts of thirteen states and the District of Columbia. *FERC Primer* at 93; Pet. App. 10a, 82a-83a. Since 2007, PJM has administered a capacity-procurement mechanism, the centerpiece of which is an annual "Base Residual Auction." Pet. App. 86a; FERC *Primer* at 96; *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, PP 71, 172 (2006). Here is how it works:

a. PJM forecasts the amount of capacity it expects the region to need during a one-year period (the "deliv-

ery year") three years after the auction, and everyone who has capacity resources (or expects to)—including independent generators, distribution utilities, and others—submits offers to PJM to have its resources used to supply a portion of the regional need. The offers are specific to particular "existing" resources (i.e., those accepted or "cleared" in a previous PJM auction to provide capacity in an earlier delivery year) and "new" resources (which have not yet cleared such an auction). PJM then matches the supply and demand. The point at which they intersect determines the amount of capacity procured through the auction and a uniform price, called the clearing price, paid to all sellers with resource offers at or below that price. Under the auction rules, nearly all existing resources and many new resources can be offered at $0/megawatt-day, thereby guaranteeing that they will clear. Pet. App. 11a, 94a.[12] PJM allocates to each of the distribution utilities and other entities that serve electric load in the region a portion of the overall cost of procuring capacity. The allocation is in proportion to the amount of load the entity serves.[13]

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[12] The Third Circuit explained that "because existing resources already incurred the costs needed to generate capacity, and could thus often afford to offer capacity at very low prices, they were permitted to offer their capacity at a price of zero dollars, which would ensure that it cleared the auction and received the clearing price." *N.J. Bd. of Pub. Utils.*, 744 F.3d 74, 86 (3d Cir. 2014) (*New Jersey*).

[13] Transmission constraints can lead PJM to require that certain amounts of capacity be located in specific parts (or zones) of PJM. The combination of such constraints and locational requirements can produce different auction clearing prices in different zones. When that happens, the associated costs are allocated to distribution utilities (and other entities that serve load) on a zonal basis.

While distribution utilities may own or contract for entitlements to generation capacity, *see* Pet. App. 90a-91a; JA 509-510; *FERC Primer* at 96, they do not use that capacity to meet their own needs directly. And their capacity reduces neither the amount PJM buys through the auction nor the proportion of auction costs allocated to utilities. Rather, distribution utility resources are offered into the auction like any other source of supply, and ownership of them provides the utility with a financial hedge. If the resource clears, the distribution utility receives the clearing price for the amount of capacity it supplies. That revenue offsets—in whole or in part, depending on the amount of distribution utility-supplied capacity that clears—the charges that PJM assesses for the utility's share of the auction capacity costs.[14]

b. The capacity auction operates in tandem with robust bilateral markets. From its earliest review of PJM's centralized capacity auction, FERC explained that "dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure" and that "the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment." *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112, P 20 (2004), *on reh'g*, 110 FERC ¶ 61,053, *on reh'g*, 112

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[14] To use a simplified example, imagine a distribution utility whose peak load is ten percent of a system operator's total peak. If the system operator bought 1,000 megawatts of capacity to meet system peak requirements at a clearing price of $90/megawatt, the utility would be responsible for one-tenth of the auction cost or $9,000. If the utility supplied forty megawatts of capacity that cleared, it would still owe $9,000 but be entitled to receive $3,600—for a net obligation of $5,400. *See PJM*, 115 FERC ¶ 61,079, P 91.

FERC ¶ 61,031 (2005), *on reh'g*, 114 FERC ¶ 61,302 (2006). PJM's auction serves as a "last resort" through which distribution utilities meet their residual capacity needs "after [they] have had an opportunity to procure capacity on their own." *PJM*, 115 FERC ¶ 61,079, P 71. As FERC explained, load-serving entities still could "build their own needed capacity" or "enter[] into long-term bilateral agreements." *Id.* P 172. The auction established the price to be paid if they "refrain[ed]" from doing so. *Id.* Auction prices have been "volatile and difficult—if not impossible—to predict," Pet. App. 98a, which enhances the need for long-term contracting.

The auction's coexistence with bilateral contracting answered some state objections to the new structure. FERC emphasized that state-regulated utilities could "create an incentive for the construction of new capacity by entering into long-term bilateral agreements." *PJM*, 115 FERC ¶ 61,079, P 172.

c. When PJM established its auction, some sellers raised concerns that distribution utilities to whom PJM allocates capacity costs might seek to suppress auction prices by subsidizing uneconomic new resources and offering them in the auction.[15] To address this potential buyer-side market power, the auction included a minimum-offer price rule that would identify and re-set offers deemed to reflect such intentions. *Id.* PP 103, 114 & n.81. The initial version of the rule exempted new, state-identified resources needed to avert impending power shortages. *Id.* P 103 n.75. Exemption from the minimum-offer rule allowed those

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[15] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, PP 34, 98, 103 (2006), *reh'g granted in part*, 119 FERC ¶ 61,318, *reh'g denied*, 121 FERC ¶ 61,173 (2007), *petition for review denied sub nom. Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (unpublished).

resources to be offered into the auction at $0/megawatt-day, ensuring that they would clear and produce offsetting revenue. *Id.* FERC accepted the exemption as "reasonable because it enables states to meet their responsibilities to ensure local reliability." *Id.* P 104.

4. FERC's orders on auction participation of state-contract-backed resources

After Maryland began investigating the need for new generation to address reliability concerns, but before it acted, incumbent suppliers complained to FERC that below-cost bids for new, state-contract-backed resources could distort capacity auction prices. FERC agreed, and directed PJM to eliminate the exemption for such resources, thereby subjecting them to the cost-based minimum-offer rule. *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 139 (2011), *on reh'g*, 137 FERC ¶ 61,145 (2011), *reh'g denied*, 138 FERC ¶ 61,160, *and reh'g denied*, 138 FERC ¶ 61,194 (2012), *review denied sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014).

FERC also concluded that any resource clearing the auction under its revised rule would be "economic," "competitive," and "[would] not artificially suppress market prices," even if the resource received state support. *Id.* PP 175, 177. On rehearing, FERC affirmed these findings and held that its decision "reconcile[d]" any "tension" between state generation-development programs and wholesale market needs. *PJM*, 137 FERC ¶ 61,145, P 4. The Third Circuit sustained FERC's rules, explaining that they "permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while ... prevent[ing] the state's choices from adversely af-

fecting wholesale capacity rates." *New Jersey*, 744 F.3d at 98 (footnote omitted).[16]

C. Maryland's retail electric market restructuring

In 1999, Maryland enacted its Electric Customer Choice and Competition Act, Md. Pub. Utils. Code Ann. § 7-501, *et seq.* (Competition Act), which sought to encourage competition for electric energy sales by requiring the distribution utilities to divest their generation ownership, thereby separating control of production from control of delivery. Pet. App. 63a, 105a.

The Competition Act did not relinquish the state's police power to ensure "'safe, adequate, reasonable, and proper [electric] service.'"[17] The Maryland Commission remains authorized to order its distribution utilities to build and operate new generation facilities, Md. Pub. Utils. Code Ann. § 7-510(c)(6), or to direct them to enter into contracts supporting new generation built by

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[16] The D.C. Circuit reached the same conclusion regarding the application in New England of a similar minimum-offer rule to state-sponsored resources. *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014) (noting that imposition of FERC-approved minimum-offer rule on state-sponsored resources "simply regulate[s]" prices that result from offers, while "states remain free to subsidize the construction of new generators").

[17] Pet. App. 105a (alteration in original) (quoting Md. Pub. Utils. Code Ann. § 5-101(a)); *see also In re Calpine Corp.* No. 24-C-12-002853, slip op. at 5-9, 14-20 (Balt. Cty. Cir. Ct. Oct. 4, 2013), http://perma.cc/43RR-BWJ3 (recounting Maryland restructuring history and interpreting the Maryland Commission's continuing state-law authority), *appeal pending but stayed sub nom. Md. Office of People's Counsel v. Md. Pub. Serv. Comm'n*, No. 1738, Sept. Term 2013 (Md. Ct. Spec. App. docketed Nov. 6, 2013).

independent developers, *In re Calpine*, slip op. at 19-20.

D. Maryland's procurement of new generation

In summer 2007, PJM began warning Maryland about a potential capacity shortfall the following year. Pet. App. 110a. In December, the Maryland Public Service Commission (Maryland Commission) reported to the General Assembly that the state faced a "'critical shortage of electricity capacity,'" which the wholesale markets were unlikely to provide in the near-term. *Id.* at 108a-109a (italicization removed). The economic downturn in 2008 slowed the rate at which demand was growing, and diminished the urgency of the need, *id.* at 35a-36a, but was not a permanent change, *id.* at 35a-36a, 39a, 47a, 49a.

In September 2009, the Maryland Commission opened a proceeding to consider the adequacy of the state's electric capacity, which produced the orders at issue here. *Id.* at 113a. In December 2010, the Commission issued a draft "Request for Proposals for Generation Capacity Resources Under Long-Term Contract" seeking up to 1,800 megawatts of new generation capacity. *Id.*

In December 2011, eight months after FERC made state-contract-backed resources subject to the auction's minimum-offer rule, Maryland issued an amended request for proposals seeking up to 1,500 megawatts of new natural gas-fired generation in the PJM subregion encompassing Maryland. *Id.* at 117a-118a. Maryland received seven bids, including CPV's. *Id.* at 121a. CPV developed its bid by estimating its cost to construct and operate the facility, plus a reasonable return on its investment. *Id.* at 147a.

In April 2012, Maryland issued the generation order at issue here (*id.* at 29a-61a). Maryland found that 650-700 megawatts of new natural gas-fired generation capacity would be needed by 2015, as a hedge against possible retirement of coal-fired plants. *Id.* at 48a-52a.[18] New natural gas-fired generation facilities also are capable of changing their output levels flexibly to offset changes in intermittent wind and solar generation. *Id.* at 52a. Adding natural gas-fired capacity enables reliable integration of more intermittent renewable resources. *Id.*

Maryland selected CPV's bid as providing the best price for Maryland ratepayers. *Id.* at 56a-57a. In exchange for fixed revenues, CPV offered to build a major generation facility and to make its output available to the PJM market (forsaking opportunities to retire or sell elsewhere) for twenty years. *Id.* at 26a; JA 389. Having decided to "accept that bid," Pet. App. 60a, Maryland directed three of its distribution utilities to execute a "[c]ontract for [d]ifferences" with CPV based on it. *Id.* at 61a. The distribution utilities appealed Maryland's order to the state circuit court, which found it within the Maryland Commission's state-law authority. *In re Calpine.*

E. The contracts

Under the contract, the distribution utilities were to pay CPV the contract price for capacity and energy sold to PJM, and CPV would pass through to the distribution utilities the revenues CPV received from PJM.

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[18] No major generation facilities had been built recently in Maryland or other eastern PJM states, while the fate of Maryland's aging, coal-dependent generation fleet was growing tenuous. *Id.* at 49a-51a. PJM identified 2,320 megawatts of Maryland's generation as being at "'high risk'" of retirement. *Id.* at 35a.

Pet. App. 147a-148a. By "exchang[ing] the 'unknown or variable ... prices' received in the PJM Markets for the fixed contract price," *id.*, the contract was designed to give CPV a stable revenue stream and to transfer market-price risk to retail ratepayers.

Maryland, however, was unwilling to saddle retail ratepayers with the risk that CPV's resource would fail to clear the auction. While the contract obligated CPV to offer capacity and energy to PJM each year, payment to CPV under the contract was conditioned on its resource clearing the auction.[19] That condition was an essential ratepayer protection, because PJM would charge the distribution utilities their share of the auction costs regardless of whether CPV's resource cleared. If the CPV resource cleared, it would produce revenue offsetting those charges; but if it did not clear, it would produce no such revenue. Had the contracts obligated ratepayers to pay CPV unconditionally, they could have had to pay twice for capacity—once to CPV and again to PJM—with no offsetting revenue.

F. CPV's auction participation

PJM's minimum-offer rule established a default offer floor based on the cost of a hypothetical resource, but also allowed sellers to justify a (lower) unit-specific offer based on a resource's actual costs. CPV sought to justify a unit-specific offer. PJM reviewed CPV's proposed bid calculation and a separate assessment by PJM's independent market monitor, and set an offer

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[19] Pet. App. 146a. As a practical matter, this condition would be an issue only until the resource cleared for the first time. Thereafter, like all existing resources, the CPV plant could bid zero and be virtually assured of clearing. The district court noted PJM's report that in some auctions, "80% of the participants bid zero." *Id.* at 94a.

floor of $96.13/megawatt-day for CPV's resource. *Id.* at 125a. CPV offered its resource at that PJM-calculated level. *Id.* at 125a-126a.

The auction for the relevant geographic sub-region cleared at a price of $167.46/megawatt-day. *Id.* at 126a. CPV's lower bid cleared the auction. CPV thereby became obligated to provide capacity three years later, and its resource became eligible to be treated as an "existing" unit (i.e., eligible to bid $0/megawatt-day) in subsequent auctions.

G. The district court decision

Dissatisfied with the outcome of the FERC litigation over the bidding rules for state-sponsored resources, and concerned about the prospect of CPV's resource clearing PJM's auction, PPL EnergyPlus (PPL) and other incumbent generators (Respondents here) sued under 28 U.S.C. § 1331, alleging that Maryland violated the Supremacy Clause and Commerce Clause. Pet. App. 65a.

After a bench trial, the district court held Maryland's order field preempted. The court focused on "whether the compensation mechanism, the [contract for differences], impermissibly set wholesale prices for CPV's energy and capacity sales into the PJM Markets." *Id.* at 140a. The court dismissed CPV's role as a willing seller in setting the contract for differences rate, observing that while CPV proposed it, the rate "became operative only after [it was] reviewed, evaluated, and accepted by the [Maryland Commission] in an agency order." *Id.* at 143a n.48.

The district court declined to reach PPL's conflict-preemption claims, *id.* at 163a, but reached and rejected its Commerce Clause claims. *Id.* at 192a-193a. Maryland and CPV appealed; PPL did not.

H. The Fourth Circuit decision

The Fourth Circuit affirmed the district court's field-preemption ruling. It held Maryland's actions preempted on grounds that its order "ensure[d]" that CPV would receive the fixed contract price for its sales to PJM and that Maryland's "scheme" supplanted the PJM auction rate with the contract rate. *Id.* at 19a.

Reasoning from the (faulty) premise that there could be only one legal rate for capacity sales to PJM, the court of appeals went beyond the district court and also found Maryland's actions conflict preempted. The court treated FERC's minimum-offer rule orders, which regulated auction participation by CPV and similar entities, as "confirm[ing] rather than refut[ing] the existence of a conflict. *Id.* at 27a.

I. FERC's rejection of CPV's contract filing as a nullity

FERC did not participate in either the district or appellate court litigation. After the Fourth Circuit decided that the contract constituted a wholesale-sale rate, CPV filed the agreement with FERC. *CPV Shore, LLC*, 148 FERC ¶ 61,096, P 1 (2014). FERC found that the court decisions rendered the contracts a "substantive nullity" and "no longer valid," preventing FERC from reviewing them. *Id.* PP 28, 30.[20]

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[20] This was not the first time FERC learned of the agreements. FERC's minimum-offer decisions were informed by Maryland's then-impending procurement. *PJM*, 135 FERC ¶ 61,022, P 2 & n.5. Also, when CPV requested market-based rate authority to sell capacity to PJM (which FERC granted), CPV attached a copy of the agreement for informational purposes. *CPV Shore, LLC*, 142 FERC ¶ 61,081, P 8 (2013).

SUMMARY OF ARGUMENT

The touchstone of preemption analysis is Congress's intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Preemption can be express or implied. This case involves implied preemption, which occurs when (a) Congress legislates comprehensively, leaving no room for state action; or (b) there is actual conflict between state and federal laws—e.g., where compliance with both is physically impossible, federal law includes an implicit barrier to state regulation, or the state law would impede accomplishment of Congress's objectives. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

The primary question here is whether, in according FERC exclusive authority over wholesale rates, Congress implicitly foreclosed states from doing what Maryland did: decide that it needed new generation facilities, conduct a competitive procurement, and direct state-regulated utilities to accept the best proposal by a generation developer to build a new facility and offer its capacity and energy to a regional market for twenty years.

The FPA's text, statutory structure, and forty years of this Court's precedent demonstrate that the answer is no. Under the FPA, FERC-jurisdictional sellers like CPV set their own rates, and may do so by choosing to enter contracts to sell wholesale electricity. FERC reviews the resulting transactions. This allocation of wholesale rate authority establishes the contours of the federal field and the test for whether a state infringes it. So long as a state neither controls a FERC-jurisdictional seller's decision whether and on what terms to sell, nor determines or second-guesses FERC's determination whether that rate is reasonable, the state remains on its side of the line.

Maryland breached no statutory boundary. The state regulated no wholesale seller and dictated no rate. It directed state-jurisdictional utilities to accept a willing seller's offer. Absent the decisions below, FERC could have reviewed the resulting contract. Finding preemption in these circumstances turned the FPA on its head, frustrating a seller's ability to set its rate, FERC's ability to review it, and the state's ability to promote desired generation development—all because the state-jurisdictional counterparties entered the agreements on state orders.

The second question is whether the existence of a short-term interstate market precluded CPV from proposing and Maryland from accepting the long-term contracts at issue. Again the answer is no. The Fourth Circuit's core assumption—that PJM's capacity auction establishes the only legal rate for and the maximum duration of any capacity sale in or to PJM—was wrong. It overlooked CPV's statutory right to seek to sell on other terms, subject to FERC review. It also misconstrued the design of the PJM "Base Residual Auction." As FERC made clear in approving the auction (and as its name makes plain), PJM's auction operates as a *residual* mechanism supplementing, not supplanting, wholesale sales contracts—including those entered to support new generation. Treating a one-year auction price as the only legal rate circumscribes sellers' rate-setting authority, contrary to the statute, and recreates the over-dependence on short-term prices that FERC took pains to remedy in the cases leading to this Court's *Morgan Stanley* decision.

Finally, FERC has made clear that Maryland's actions did not interfere with the auction's operation or its outcomes. That is true regardless of whether contract payments were contingent on CPV's offer clear-

ing. FERC established the rules governing how state-contract-backed resources participate in the PJM auction. Those rules assumed CPV had an incentive to offer below cost, and, by subjecting those offers to a cost-based offer floor, negated its ability to act on the incentive. FERC held that resources clearing the auction under these rules—as CPV's did—are "economic," "competitive," and "[do] not artificially suppress market prices."[21]

ARGUMENT

I. Maryland's procurement was not field preempted.

The court of appeals held Maryland's order field preempted on grounds that it "functionally set[] the rate that CPV receives for its sales in the PJM auction," a matter within FERC's exclusive jurisdiction. Pet. App. 19a. Maryland accepts the lower courts' decision that the contracts here constitute FERC-jurisdictional rates.[22] But the existence of wholesale contract rates does not establish preemption. The question is whether Maryland overstepped its bounds by requiring distribution utilities to accept CPV's offer and enter the contracts. It did not.

The Fourth Circuit did not spell out how, in its view, Maryland's regulation of its distribution utilities functionally set CPV's rate. The district court found state rate-setting because CPV's proposed rate "became operative only after" Maryland directed the distribution utilities to accept it. *Id.* at 143a n.48. While the

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[21] *PJM*, 135 FERC ¶ 61,022, PP 175, 177.

[22] *Id.* at 146a, 160a (The district court's decision "impli[es] that the [contract for differences] is the type of agreement governed by CPV's [FERC-approved] Tariff.").

Fourth Circuit said less, simply attributing the rate to the state, *id.* at 19a, it seemed to reason that Maryland set the contract rate because Maryland's acceptance of CPV's offer was necessary to form the contracts. That was the wrong test for field preemption because it is not rooted in—but instead undermines—the FPA framework for wholesale rate-setting and regulation.

The correct test is derived from and implicit in the FPA's rate provisions, which allow FERC-jurisdictional sellers to set their rates (including by entering contracts) and empower FERC to modify those it finds unlawful. The FPA's rate provisions focus on the volition and actions of FERC-jurisdictional sellers, not state-jurisdictional counterparties. If a state neither exercises nor constrains the exercise of the rate-setting and review authority of sellers and FERC respectively, then the state does not enter the federal field. This test is correct because its application allows each entity to do what Congress envisioned: FERC-jurisdictional sellers decide what they wish to sell and at what price; states regulate local reliability and generation development, in some cases by regulating their jurisdictional utilities' contracting decisions; and FERC regulates the resulting transactions. The Fourth Circuit's approach curtails each of these functions.

A. Maryland's procurement comported with the FPA framework.

1. When Congress enacted the FPA, it left jurisdictional sellers' rate-making and rate-changing powers "unaffected," *Mobile*, 332 U.S. at 343, and akin to those of the "seller of an unregulated commodity," *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958) (*Memphis*), while empowering FERC to modify rates it finds unlawful. Sellers may set rates by tariff or by contract. *Morgan Stanley*, 554 U.S.

at 531; *NRG Power Mktg.*, 558 U.S at 171; *Mobile*, 350 U.S. at 341; *Memphis*, 358 U.S. at 110. But there is no requirement that sellers initiate the contracting process. To the contrary, decades of experience (*supra*, pp. 11-12) and FERC's own regulations (18 C.F.R. § 35.27, JA 909) show that sellers may set rates by responding to competitive solicitations and (if they win) entering into the resulting contracts.

That is what happened here. CPV, a FERC-jurisdictional utility, responded to Maryland's request for proposals. Maryland neither required CPV to respond nor specified the prices it could offer. CPV calculated its own bid price, Pet. App. 147a,[23] and willingly entered the resulting contract. To our knowledge, before the decisions below (and the related case pending on petitions for certiorari),[24] no court has voided a FERC-jurisdictional seller's voluntary wholesale electricity sale because a state directed the seller's counterparty to enter the agreement.

2. Maryland's determination that it needed more generation facilities and its use of competitive procurement and long-term contracting to obtain them are functions that the FPA leaves to the states. As this Court has explained, quoting FERC, "[s]tates retain significant control over local matters," including "reliability of local service; ... integrated resource planning and utility buy-side ... decisions ...; [and] utility generation and resource portfolios." *New York*, 535 U.S. at

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[23] *See also id.* at 143a ("CPV configured and proposed the contract price to the [Maryland Commission] as part of its proposal, and the [Maryland Commission] adopted and accepted CPV's contract price in the Generation Order.").

[24] *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petition pending*, No. 14-634 (U.S. filed Nov. 26, 2014).

24.[25] "[R]egulating resource adequacy" is a traditional state function. *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, PP 540, 555, *on reh'g*, 120 FERC ¶ 61,271 (2007); *Devon Power LLC*, 109 FERC ¶ 61,154, P 47 (2004), *reh'g denied and clarified*, 110 FERC ¶ 61,315 (2005) ("Resource adequacy is a matter that has traditionally rested with the states, and it should continue to rest there.").

That allocation of responsibilities is consistent with both the FPA's text and common sense. In enacting and later amending the FPA, Congress consistently has distinguished between regulation of wholesale sales and regulation of wholesale purchases as to which FERC has only limited authority. *Compare, e.g.*, 16 U.S.C. §§ 824(b) (giving FERC jurisdiction over wholesale sales and facilities for those sales) and 824d(a) (FERC regulation of rates for wholesale sales) *with id.* §§ 824t(a)(3)(A) (promoting market transparency by enabling FERC to obtain information from "any market participant," including buyers) and 824v(a) (prohibiting use of any manipulative device in connection with "the purchase or sale" of electric energy).

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[25] *See also Pac. Gas & Elec. Co.*, 461 U.S. at 205, 212 ("[N]eed for new power facilities" and how they should be procured, are "characteristically governed by the [s]tates."); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000-A, 77 Fed. Reg. 32,184, 32,215 (May 31, 2012), 139 FERC ¶ 61,132, P 186 (2012), *on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *review denied sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir 2014) (per curiam), *reh'g en banc denied*, No. 12-1232 (D.C. Cir. Oct. 17, 2014) ("[S]pecific substantive matters traditionally reserved to the states[] includ[e] integrated resource planning.").

The allocation to states of authority over their distribution utilities' purchasing decisions also makes sense, because "[s]tate representatives are in the best position to determine on behalf of retail customers the trade-off between the cost to the customers of extra generation and ... the difficult-to-quantify benefits to the customers of increased reliability." Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452, 55,513 (proposed Aug. 29, 2002), FERC Stats. & Regs. ¶ 32,563, P 490 (proposed 2002) (NOPR); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, P 558 (California "may determine in the first instance the appropriate level of planning reserves by balancing reliability and cost considerations.").

Maryland's determination of the kind and amount of new generation capacity it would seek (650-700 megawatts of new natural-gas-fired capacity) is likewise a traditional state function under the FPA. *New York*, 535 U.S. at 24. States often identify "incremental resource needs using a variety of lenses, including changes in customer requirements, resource adequacy, economics, portfolio mix or diversity, and external considerations (such as environmental policy requirements)." NARUC Study at 17; *see also* 16 U.S.C. §§ 2602(19), 2621(a), (d)(7). And identified needs often are filled through competitive procurements, NARUC Study at 17, which is exactly what happened here. Maryland's selection of the winning bidder and its direction that regulated distribution utilities accept the winner's offer was neither unusual nor problematic. *Cal. Pub. Utils. Comm'n*, 134 FERC ¶ 61,044, P 30 (2011) (States may "dictate" the specific "generation resources from which utilities may procure electric energy.").

3. Maryland's acceptance of CPV's offer neither regulated that offer nor amounted to an FPA-type determination that it was just and reasonable. And Maryland's action posed no obstacle to FERC's FPA review. Maryland provided a counter-party with whom CPV could contract and thereby establish a rate. The district court held that the contract constituted a FERC-jurisdictional rate for CPV's sales to PJM. Pet. App. 156a, 160a. As such, the contract was subject to FERC's jurisdiction, and, but for the rulings below, FERC could have reviewed the contract and decided whether it satisfied the FPA's requirements.[26]

The district court held that FERC's ability to review the contracts could not save Maryland from the consequences of its preempted rate-setting. Pet. App. 160a-161a. But that finding begged the question. Maryland agrees that it could not set CPV's rate; the question is whether it did so. For the reasons explained above, it did not.

B. The Fourth Circuit's approach undermines the FPA framework.

The Fourth Circuit's field-preemption holding upsets the FPA's framework, and impairs all of the statutorily protected interests.

1. The decision undermines states' ability to ensure that they have enough generating capacity to maintain reliability and the right types of resources to advance state policies. If directing distribution utilities to ac-

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[26] Even if CPV failed to file the contract when required, FERC could have demanded it. FERC routinely orders public utilities to file previously unfiled contracts that FERC deems jurisdictional. *E.g.*, *Cent. Me. Power Co.*, 56 FERC ¶ 61,200, at 61,818, *on reh'g*, 57 FERC ¶ 61,083 (1991), *aff'd*, 63 FERC ¶ 61,108, *reh'g granted*, 64 FERC ¶ 61,376 (1993).

cept CPV's offer impermissibly set wholesale rates, then the same analysis would proscribe state-directed procurement of *any* FERC-jurisdictional product. Respondents themselves have said as much. Br. in Opp. 25 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) ("[*A*]*ny* state law falling within [an exclusively federal field] is preempted.") As FERC's field spans all transmission and wholesale sales by public utilities, such a rule would be calamitous.[27]

2. The Fourth Circuit's rule also amounts to an extra-statutory limit on FERC and FERC-jurisdictional sellers. FERC is charged with the "orderly development of plentiful supplies of electricity ... at reasonable prices," *NAACP v. FPC*, 425 U.S. 662, 670 (1976), but FERC cannot order development of new generation facilities directly, even when necessary to remedy inadequate interstate service. *E.g.*, 16 U.S.C. § 824f. FERC thus depends on voluntary generation development, which depends in turn on the sellers' ability to enter long-term contracts providing revenue stability. *See Permian Basin*, 390 U.S. at 822; *Morgan Stanley*, 554 U.S. at 551; The Brattle Group, *The Importance of Long-Term Contracting for Facilitating Renewable Energy Development* 13 (2013), http://perma.cc/URV4-ZEEZ ("[T]here are virtually no new generation projects in the U.S. (renewable or otherwise) being built without direct utility ownership or long-term [contracts] with utilities ....").

But under the Fourth Circuit's decision, FERC-jurisdictional sellers may not enter into contracts with

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[27] Targeted state procurements of specific kinds of supplies have become commonplace, *see* 14-614 Pet. 18-26 (discussing relevant state laws), and will become even more important as the current, aged fleet nears retirement and federal and state energy policies drive a transition to new supplies.

counterparties that act on state orders, or can do so only at risk of having their contract invalidated by a court at some future date. Given that sellers enter contracts to obtain revenue stability and support financing, the uncertainty introduced by this approach will diminish the usefulness of such contracts, inhibiting their use and impeding needed generation development.

II. FERC's acceptance of a short-term auction rate does not preclude sales at other rates.

Deeming field- and conflict-preemption principles "mutually reinforcing," Pet. App. 24a, the Fourth Circuit found preemption because the allegedly state-set contract rate differed from the single-year rate set by PJM's auction. *Id.* at 25a-26a. Indeed, the court depicted the arrangement as a preempted "scheme ... effectively supplant[ing] the rate generated by the auction with an alternative rate preferred by the state." *Id.* at 19a. The court then drew a faulty analogy to two decisions of this Court: *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).[28] In those cases, this Court held that the FPA requires states to pass through in retail rates costs that FERC, in earlier wholesale-rate decisions, has accepted or mandated as reasonable. The Fourth Circuit reasoned that, if the FPA requires pass-through of FERC-approved wholesale rates that states deem too high, the same logic should prohibit states from requiring supplementation of FERC-approved

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[28] The court of appeals advanced the analogy to support its field-preemption ruling, but this Court later clarified that *Mississippi* is "best read as a conflict pre-emption case." *ONEOK Inc.*, 135 S. Ct. at 1593.

auction prices that states deem too low. Pet. App. 20a-21a.

But the posture of this case foreclosed analogy to *Mississippi* and *Nantahala*. In those cases, retail regulation occurred *after* FERC accepted a wholesale rate, complicating FERC's efforts to police its jurisdiction. In cases like this one, state regulation contributes to *forming* a wholesale rate. FERC's ability to review the contracts here and its decision delineating how state-contract-backed resources like CPV's participate in PJM's auction precluded any possibility of a conflict.

Similarly, the factual predicate undergirding *Mississippi* and *Nantahala* is missing here. Those cases involved a single FERC-approved wholesale rate and the question whether states had to respect it. Here, there is no single legal rate for capacity sales in the PJM region or to the system operator. A PJM tariff providing for it to *buy* capacity cannot prohibit FERC-jurisdictional sellers from exercising their statutory right to sell on different terms subject to FERC review. That is particularly true where the PJM tariff establishes a short-term auction expressly designed to work in tandem with long-term contracts to support new generation.

A. The FPA prevents PJM from setting the exclusive filed rate for other entities' capacity sales.

A public utility, "like the seller of an unregulated commodity," has the right to file and "change its rates as it will, unless it has undertaken by contract not to do so." *Memphis*, 358 U.S. at 113. Sellers do not relinquish FPA-protected rights simply by participating in or selling to a regional wholesale market. *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (*Atlantic City*), *mandate enforced*, 329 F.3d 856 (D.C. Cir.

2003); *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 923-24 (9th Cir. 2005).

1. In *Atlantic City*, the D.C. Circuit addressed a dispute about whether PJM or its participating transmission owners had the right to file transmission-rate-design changes under FPA section 205. The transmission owners sought to retain that right when they turned over functional control of their facilities to PJM. FERC directed them to cede that right to PJM. The transmission owners appealed, and the D.C. Circuit vacated FERC's decision. Drawing on this Court's precedent in *Mobile* and *Memphis*, the D.C. Circuit held that "FERC can point to no statute authorizing its requirement that the utility petitioners cede their statutory rights under [FPA] section 205 ... to file changes in rate design with the Commission." *Atlantic City*, 295 F.3d at 15.

The same rationale governs CPV setting rates for its capacity sales. CPV is the FERC-jurisdictional seller and cannot be stripped of its FPA-protected right to sell on terms it chooses, subject to FERC review.

2. In its brief opposing certiorari, the United States argued that sellers participating in the PJM auction implicitly agree to take the auction price—and only the auction price—in exchange for their capacity sales. U.S. Br. 23-24. But the United States pointed to no explicit waiver, and none can be implied. Sellers and other market participants agree to abide by PJM's tariff and other rules, but section 9 of that tariff[29] explicitly preserves all parties' rights under the FPA as they would exist absent the tariff. That means CPV is free to agree to sell to PJM on the rates, terms, and condi-

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[29] PJM Interconnection, L.L.C., *Open Access Transmission Tariff* § 9 (effective Dec. 20, 2010), http://perma.cc/8P8M-5W7H.

tions of its choosing, subject to FERC review. And any effort to require CPV to relinquish its rate-setting rights involuntarily would be foreclosed by the statute, for the reasons expressed in *Atlantic City*.

3. In fact, generators sometimes do file rates for their sales into regional markets that differ from "the auction rates approved by FERC," Pet. App. 26a. When market revenues are insufficient to keep an existing facility in operation, the generator may retire or seek a cost-of-service rate for continued operation. System operators like PJM enter into such cost-of-service agreements, generically called "'reliability must-run'" agreements, and FERC accepts them, to keep the facility in operation until it is no longer needed. *See NRG Power Mktg.*, 558 U.S. at 169. Like the contracts for differences here, such agreements set fixed rates and make up the difference between those rates and a generator's market revenues. *Id.*; *Blumenthal v. FERC*, 552 F.3d 875, 879 (D.C. Cir. 2009).

When the generator and system operator cannot agree on the rate, the generator sets the rate under FPA section 205, subject to FERC review. *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, P 92 (2014), *reh'g denied in relevant part*, 153 FERC ¶ 61,062, PP 67-68 (2015). FERC affirmed that conclusion, over a system operator's objection that *it* should set the rates, specifically because the FPA gives the generator-sellers the right to set the rates for their own sales. 153 FERC ¶ 61,062, P 68. FERC also rejected claims that a seller waives its right to seek other rates by selling into a regional wholesale market. *Id.* P 39.

Since 2008, FERC-jurisdictional sellers have chosen to sell a total of 1,778 megawatts of capacity to PJM under cost-of-service reliability agreements.[30]

B. By design, the auction works in tandem with long-term bilateral contracts.

The Fourth Circuit characterized Maryland's order as a "program to subsidize the participation of a new power plant in the federal wholesale energy market." Pet. App. 9a. While there would be nothing wrong with a subsidy, that word mischaracterizes the contract in this case. The contract here was not a subsidy or a supplement to the PJM auction rate; it was a different rate reflecting different commitments. Unlike auction sellers who commit only a year at a time, CPV committed to offer capacity in the PJM auction each year for twenty years. The contract rate was consideration for that long-term commitment. And unlike the single-rate predicate of *Mississippi* and *Nantahala*, there can be no filed-rate bar to contracts providing the seller a different rate in exchange for a different commitment. *See Fla. Mun. Power Agency v. Fla. Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995).

When it accepted the PJM capacity auction, FERC made clear that there is room for long-term contracts to exist alongside the shorter-term auction. FERC did not mandate reliance on single-year auction prices but, rather, held that the auction was to work in concert with—indeed, that it would promote—long-term bilateral contracting. *PJM*, 115 FERC ¶ 61,079, P 70. The auction is a "last resort" means for PJM to procure needed capacity "after [load-serving utilities] have had

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[30] *2015 ISO/RTO Metrics Report* 299, FERC Docket No. AD14-15-000 (Oct. 30, 2015), eLibrary No. 20151030-5211, http://perma.cc/CY6K-7ZEM.

an opportunity to procure capacity on their own." *Id.* P 71. FERC said the auction would "provide price signals and price stability that will enable [load-serving utilities] to purchase capacity, and generators to offer to provide capacity," in a more informed and efficient fashion. *Id.* P 169.

Under the auction design, distribution utilities still could decide (subject to state regulation) whether to "build their own" generation facilities, "create an incentive for the construction of new capacity by entering into long-term bilateral agreements," or pay the auction prices if they refrained from doing so. *Id.* P 172. But, "[a]rmed with [the] superior quality of information" provided by the short-term auction, market participants still would "make their own business decisions about how much capacity to build or procure in long-term contracts and at what cost, and how much to obtain through PJM's auction." *Id.* P 169.

Indeed, while FERC encourages development of short-term regional markets, it never has held that those markets are the sole wholesale-rate mechanism for inducing investment in new facilities. If that were the rule, it would recreate nationally the California market-design flaw that FERC took great pains to fix. "Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce." *Morgan Stanley*, 554 U.S. at 547. That is why FERC responded to California's market dysfunction by removing barriers to long-term contracting. *Id.* And California availed itself of the benefits of contract stability by directing a state agency (in lieu of insolvent distribution utilities) to enter into such contracts. *Pub. Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587, 591 (9th Cir. 2006), *vacated sub nom. Sempra*

Generation v. Pub. Utils. Comm'n of Cal., 554 U.S. 931 (2008).

Contracting against the backdrop of a short-term market allows states and distribution utilities to manage risk and promote development of resources with characteristics the regional auctions are not designed to value. In a proposed rule aimed at promoting long-term contracting in organized markets, FERC explained that contracting opportunities are important to sellers, buyers, and the market generally. "[I]t is important for buyers and sellers in organized markets to be able to choose a portfolio of short-term, intermediate-term, and long-term power supplies," because "[h]aving portfolio choice allows market participants to manage ... risk," which promotes infrastructure investment, "particularly for new entrants ... and especially for many renewable energy developers."[31]

FERC acknowledges that PJM's capacity auction does not "recognize ... environmental or technological goals, nor does it contemplate reliability concerns beyond a three-year forecast." *PJM*, 137 FERC ¶ 61,145, P 90. At the same time, FERC understands that "well-designed" capacity markets "allow[] ... buyers to choose the infrastructure with the best combination of features such as cost, reliability, environmental effects, and service life." NOPR P 473. As FERC explained in the context of another region with a short-term capacity market:

> Nothing ... prevents a state from requiring its [distribution utilities] to meet capacity require-

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[31] Wholesale Competition in Regions with Organized Electric Markets: Advance Notice of Proposed Rulemaking, 72 Fed. Reg. 36,276, 36,287-88 (proposed July 2, 2007), FERC Stats. & Regs. ¶ 32,617, PP 83, 85 (proposed 2007).

> ments [imposed by a regional transmission organization] through demand response, or through contracts to purchase power[, or] ... through resources that meet state health or environmental or land-use planning goals. In essence, [the system operator] says to its [distribution utilities], "Provide X amount of resources." But *how* those resources are provided is up to the [distribution utilities] and the states.

ISO New England, Inc., 120 FERC ¶ 61,234, P 29, *corrected*, 121 FERC ¶ 61,121 (2007); *see also Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). State-directed contracting is the mechanism that allows states and their distribution utilities to choose the infrastructure with the best combination of features for their local needs and to obtain the price stability needed to develop those resources.

C. The contract for differences was functionally equivalent to a traditional bilateral sale.

In their brief opposing certiorari (at 25-26), Respondents protested that the contract for differences here was not a real bilateral agreement because, under it, CPV was to sell to PJM and not the distribution utilities. That objection is misguided. In affording jurisdictional sellers the right to sell and set rates by contract, the FPA encompasses a wide range of arrangements tailored to specific needs and circumstances. CPV and Maryland used the flexibility of FPA contracting against the background of the PJM auction to allocate risks in a way that supported development of needed new generation facilities.

There was nothing wrong with or unusual about that approach. A contract for differences is a common

contracting model in the industry,[32] and aids organized markets by reducing suppliers' incentives to exercise market power.[33] A contract for differences is sometimes called a "synthetic power purchase agreement" because it performs the same function as a bilateral purchase against an organized-market backdrop.[34]

With one exception discussed below, the contract for differences here produced the same incentives and same outcomes as would a sale of CPV's capacity to the distribution utilities, who then would resell it to PJM. If the distribution utilities bought the capacity, they would pay CPV the contract price. They also would pay PJM for their shares of the auction costs. The distribution utilities would offer the capacity from CPV's resource into the PJM auction to seek revenues offsetting the PJM charges. The distribution utilities would have an incentive to offer the capacity at the lowest price allowed, to ensure that it clears, but their offers would be subject to the auction's offer floor and adjusted to comply. If the capacity cleared, PJM would pay and the distribution utilities would receive the auction price.

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[32] *E.g.*, Nat'l Renewable Energy Lab., *Innovations in Wind and Solar PV Financing* 10 (2008), http://perma.cc/QSS2-QGF9.

[33] *See* Michael A. Yuffee, *California's Electricity Crisis: How Best to Respond to the "Perfect Storm,"* 22 Energy L.J. 65, 70 & n.16 (2001). When contracts for differences provide a fixed price for the seller, it reduces the seller's incentive to seek to raise the market price.

[34] *E.g.*, Allan T. Marks & Lily Rasel, *Financing Wind Projects With Synthetic PPAs*, N. Am. Windpower (Apr. 2014), http://perma.cc/ZKT4-R3W2 ("The synthetic [purchase power agreement] essentially functions as a hedge against market price volatility, providing pricing certainty for a negotiated quantity of produced energy (based either on actual output or a fixed amount per year).").

The contract for differences here would have accomplished the same results in one step rather than two. CPV retained the capacity and offered it to PJM. As its contract payments were conditioned on clearing, CPV had an incentive to offer at low prices, but was subject to the auction's offer-floor rules. Its offer was adjusted to comply with those rules, and the adjusted offer cleared. PJM paid CPV the auction price. Under the contract, CPV would have passed the auction price through to the distribution utilities and received the contract price instead.

In each case, PJM would pay the auction price, CPV would receive the contract price, and the distribution utilities would pay or receive the difference. In each case, the entity offering capacity to PJM has an incentive to offer it at a low price to ensure it clears, but is subject to the auction's offer-floor rules. So long as the capacity clears in the auction, there is no meaningful difference between the structures.

But there is a significant difference concerning who bears the risk that CPV's resource fails to clear PJM's auction. The contract here imposed that risk on CPV, which would not be paid under the contract if the resource failed to clear. Pet. App. 146a. If, instead, the distribution utilities had simply bought capacity from CPV, they (and their ratepayers) would have been at risk of paying twice to meet the same capacity need. A distribution utility that has obtained capacity cannot use it to reduce the amount of capacity PJM buys or the proportion of costs that PJM allocates to it. Rather, the distribution utility must offer the capacity into the auction, in the hope that it will clear and produce revenue that offsets PJM charges. If the distribution utilities here had bought CPV's capacity but the resource failed to clear, the distribution utilities would have had

to pay both PJM and CPV without receiving any offsetting revenue. Neither the FPA nor the Constitution required Maryland's citizens to incur that risk as the price for needed generation facilities.

D. The PJM auction's "New Entry Price Adjustment" did not cap the duration of bilateral contracts.

In addition to finding the contract rates at odds with the auction price, the Fourth Circuit found that the contracts' twenty-year term impermissibly conflicted with the "three-year period during which certain new generators are eligible to receive a fixed price for the capacity they sell in the PJM [auction]." Pet. App. 26a. Again the Fourth Circuit's decision misconstrues the relationship of the PJM auction to wholesale power contracts. FERC has never held that a willing seller, like CPV, cannot sell power in PJM for a contract term longer than three years.

By operation of PJM's tariff, "new" capacity (i.e., capacity that clears in the auction for the first time) may elect to "lock in" that first-year auction price for up to three years. *PJM Interconnection L.L.C.*, 126 FERC ¶ 61,275, P 140, *corrected*, 127 FERC ¶ 61,036, *clarified*, 127 FERC ¶ 61,104, *on reh'g*, 128 FERC ¶ 61,157 (2009). PJM pays that fixed price, and passes it through to customers just like any other capacity-auction cost. *Id.* PP 149-150. PJM proposed (and FERC accepted) this mechanism, called the "New Entry Price Adjustment," to address a discrete market-design problem: when high auction prices induce entry of an efficiently large new resource, that entry can create a temporary surplus and severely reduce the following years' prices, especially in a small sub-market. *PJM Interconnection L.L.C.*, 128 FERC ¶ 61,157, P 101 (2009). As potential entrants can predict this phenom-

enon, it diminishes their incentive to enter. The New Entry Price Adjustment creates an in-market mechanism to counteract this dynamic. *Id.*

In 2009, CPV urged FERC to extend the fixed-price period to ten years. *See* Pet. App. 26a. FERC refused, reasoning that "'[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that the price signals are not skewed in favor of new entry.'" 128 FERC ¶ 61,157, P 102. The court characterized Maryland's action as "an effort by the state to directly override this explicit policy choice" by providing CPV with prices fixed for twenty years. Pet. App. 26a.

But the court's interpretation of this ruling makes too much of too little. FERC's decision regulating the prices that PJM pays new entrants did not preclude contracts through which others agree to pay different amounts. Neither the quoted FERC order nor any FERC decision discussing PJM's new entry price adjustment ever suggested that FERC intended the duration of the tariff adjustment to act as a limit on the duration of fixed-price contracts.

If there were any remaining doubt, FERC's orders responding to the Maryland and New Jersey procurements should dispel it. As recounted above, a group of incumbent suppliers filed a complaint in February 2011 asking FERC to compel PJM to revise its minimum-offer rules in response to the state programs. *PJM*, 135 FERC ¶ 61,022, PP 2, 20, 77-79 & nn.50-51, 86-88, 124-143. FERC agreed that, absent reforms, unjustifiably low offers for the selected state resources could suppress auction prices. So FERC acted to "ensure[] ... [that] wholesale capacity market prices remain at just and reasonable levels." *Id.* P 141. In doing so, however, FERC emphasized that it was "not inter-

fer[ing] with states ... that for policy reasons seek to provide assistance for new generation entry if they believe such expenditures are appropriate for their state." *Id.* Nor did the rule "encroach on a state's ability to act within its borders to ensure resource adequacy or to favor particular types of new generation." *Id.* P 142.[35]

In taking action, FERC addressed arguments aimed specifically at the use of contracts for differences, *id.* P 77 & n.50, and knew that the contracts Maryland contemplated could have terms up to twenty years, *id.* P 2 & n.5 (citing Maryland's December 2010 draft request for proposals which set a maximum twenty-year term). If long-term contracts like those contemplated by the states were inconsistent with FERC's policies and therefore preempted, FERC would have said so, instead of devoting substantial resources to "reconcil[ing] the tension" between FERC's duties and the "policies enacted by states and localities that seek to construct specific resources." *PJM*, 137 FERC ¶ 61,145, P 4.

And FERC's order denying rehearing was even clearer as to its acceptance of the underlying state arrangements. FERC "recognize[d] that states ... have their own policies and objections," some of which "may not be recognized in the [auction] construct generally or the [minimum-offer rule] in particular." *Id.* P 3. FERC sought neither to "pass judgment on" those policies nor to "unreasonably interfere" with them. *Id.*

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[35] The Fourth Circuit construed FERC's having to take action as "tend[ing] to confirm rather than refute the existence of a conflict." Pet. App. 27a, but FERC found that its actions "reconcile[d]" any "tension" between state generation-development programs and wholesale market needs, 137 FERC ¶ 61,145, P 4.

PP 3, 89.[36] FERC reiterated this view just a few months ago, explaining that its rules "do[ ] not prevent the states from pursuing their own public policy requirements," but only ensure that those initiatives "do[ ] not discriminatorily affect the outcome of the PJM auction." *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066, P 34 (2015). In short, none of FERC's orders has suggested that PJM's New Entry Price Adjustment circumscribes what states or others may agree by contract to do outside the auction.

III. FERC's rulings foreclosed any auction price distortion claims.

The Fourth Circuit's opinion also finds that Maryland's actions were preempted because they could distort the PJM auction prices to the detriment of other sellers. *See* Pet. App. 25a-26a.[37] The district court made no such findings, and neither has FERC. To the contrary, the idea that Maryland's order could distort the PJM auction contradicts FERC's rulings.

Maryland issued its April 2012 order a full year after FERC ruled that resources selected through Maryland's procurement would be subject to the auction's offer floor. FERC determined how the offers for such resources would be evaluated to determine whether they were competitive and, if not, how they would be adjusted. These rules established an offer floor equal to the lower of a generic benchmark or a unit-specific bid "consistent with the competitive, cost-based, fixed, net

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[36] The very same FERC orders also addressed the timing for potential reforms of the auction's New Entry Price Adjustment. 135 FERC ¶ 61,022, PP 198-206; 137 FERC ¶ 61,145, PP 141-144.

[37] *See also id.* at 14a (recounting the Plaintiffs-Appellees' claims that Maryland's order "resulted in the suppression of PJM prices").

cost of new entry 'were the resource[s] to rely solely on revenues from PJM-administered markets.'" *See PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,194, P 21 (2012) (quoting *PJM*, 137 FERC ¶ 61,145, P 65), *review denied sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014). PJM made an independent assessment of CPV's unit-specific offer floor applying this standard. Pet. App. 125a. CPV offered its resource at the PJM-calculated floor, *id.* at 125a-126a, and that offer cleared with room to spare. *Id.*

As described above, such resources are considered "competitive," "economic," and "needed by the market," even if the resource also receives subsidies outside the market. *PJM*, 135 FERC ¶ 61,022, PP 175, 177; *see also* 137 FERC ¶ 61,145, P 133. FERC held expressly that such resources "[do] not artificially suppress market prices." 135 FERC ¶ 61,022, P 175. Parties appealed FERC's rulings from both sides, with some arguing that the new offer-floor rules were too stringent and others that they were insufficient. The Third Circuit upheld FERC's decisions, finding that: "what FERC has ... done here is permit states to develop whatever capacity resources they wish ... while ... prevent[ing] the state's choices from adversely affecting wholesale capacity rates." *New Jersey*, 744 F.3d at 98.

After the 2012 auction in which CPV cleared, PJM proposed changes to its offer-floor rules, including eliminating the unit-specific review procedure CPV had used. FERC required PJM to maintain the procedure because it was pro-competitive. "[S]ome resources, including those that would fail to qualify for [the exemptions], may nonetheless have competitive costs that fall below the benchmark price." *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, P 143 (2013), *reh'g denied*, 153 FERC ¶ 61,066 (2015). FERC held that resources

with competitive costs lower than the benchmark should be able to submit offers consistent with those costs. Without naming CPV, FERC pointed to it as an example, and observed that the relevant resulting auction prices were just and reasonable. 143 FERC ¶ 61,090, P 143; 153 FERC ¶ 61,066, P 23.

FERC's specific, repeated holdings that the offer for CPV's resource did not distort the auction foreclose a contrary finding in this case. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1304-05 (2015). The exclusive avenue for challenging those holdings was judicial review, 16 U.S.C. § 825*l*(b), and the Third Circuit upheld FERC's orders, *New Jersey*,744 F.3d at 80.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

Scott H. Strauss*
Peter J. Hopkins
Jeffrey A. Schwarz
**Counsel of Record*
Spiegel & McDiarmid LLP
1875 Eye St., NW, Suite 700
Washington, DC 20006
(202) 879-4000
scott.strauss@spiegelmcd.com

James A. Feldman
5335 Wisconsin Ave., NW
Washington, DC 20015
(202) 730-1267
wexfeld@gmail.com

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